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Supreme Court No. 90926-1
COA No. 69663-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE MARTINES,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Mariane C. Spearman

ANSWER TO STATE'S PETITION FOR REVIEW

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A. ARGUMENT TO DENY REVIEW.

(1). Settled constitutional principles under the Fourth Amendment and Article 1, § 7 determined the outcome in *Martines*.

a. The Court of Appeals correctly decided the issues litigated by the parties. Mr. Martines was convicted of DUI at a trial in which the State contended that he drove while under the influence of drugs or a combination of drugs and alcohol, in reliance on the results of forensic testing of his blood. CP 45.

Mr. Martines argued on appeal that there was no probable cause that he was under the influence of a drug, and that in fact, the search warrant that was issued for the taking of his blood, by its plain language, completely failed to grant judicial authority for any forensic testing of the defendant's drawn blood at all. AOB, at pp. 5-13, Reply at pp. 3-8, Decision, at p. 3 (setting out appellant's arguments).

The State's responsive argument on appeal was singular[1]: the State argued that, when seized by needle, all testing of a citizen's blood is permissible, without any warrant authority of law

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[1] The State conceded in the Court of Appeals that the search warrant did not blood testing, and argued that no probable cause or warrant is required to test blood that is in law enforcement's possession. See BOR, at p. 1 ("although the warrant did not specifically authorize forensic examination of the blood . . . [n]o Washington case requires judicial authorization").

necessary, because the testing of a person's blood does not invade any reasonable expectation of privacy – nor, the State argued, does it intrude in the least upon anyone's private affairs. BOR, at pp. 1-18. Specifically, the State argued:

> Martines contends that the results of the blood testing must be suppressed because the affidavit did not contain probable cause to believe that Martines' blood contained drugs in addition to alcohol, and because the search warrant did not authorize the testing of his blood at all. But no such specific probable cause or authorization was necessary.

BOR, at p. 10; see also BOR, at p. 8 (arguing that it would be an "empty formality" to insist on warrant authorization for alcohol testing, or drug testing, of drawn blood).

The Court of Appeals considered the parties' properly raised arguments and then determined, in State v. Martines, 331 P.3d 105, Wash.App. Div. 1, July 21, 2014 (NO. 69663-7-I) (Decision), that the following questions must be answered on appeal:

1. whether forensic testing of drawn blood is a search; and
2. whether searches require warrants.

Decision, at pp. 8-12. At issue was the question whether any, and if so what "limitations on the testing of drawn blood are required by the Fourth Amendment or article 1, section 7" of the Washington Constitution. Decision, at p. 8.

Regarding the first constitutional question, whether testing of drawn blood is a search of any private matter, the Court of Appeals concluded that settled doctrine required answering in the affirmative. The answer was based on the federal constitution's "reasonable expectation of privacy" test, and under the state constitution's criteria that asks whether an asserted privacy interest is one that citizens of this State are entitled to hold safe from governmental trespass. Decision, at p. 11; U.S. Const. amend. 4; Wash. Const. art. 1, § 7.

The second question of whether searches require warrants was also answered in the affirmative, similarly based on settled law. A search requires a particularized judicial warrant granting authority to search. Decision, at pp. 11-12. In this case, no warrant for blood testing had been issued. Decision, at pp. 12-13, and n. 2 ("The testing that occurred in the toxicology lab was a warrantless search").

A third question, that of warrant authority in terms of the language of the warrant, was a tertiary issue at most because the State *conceded* that the warrant did not grant any authority for forensic testing of the drawn blood. See note 1, supra; see also Decision, at pp. 2, 12 (noting that that warrant simply had no

language saying anything about blood testing at all). Although the question was not at issue, not even the "good faith" exception of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), applying federal constitutional doctrine, could be used to legalize a search under this warrant, which was so facially deficient that no reasonable police officer could possibly presume it to grant authority for the forensic testing that was conducted. See 2 W. LaFave, Search and Seizure § 4.5, at 563 (4th ed. 2004).[2]

This was the Court of Appeals' decision on the two questions presented, which it reached by employing settled constitutional principles, necessarily rejecting the State's position that the forensic testing of drawn blood is not a "search." See BOR, at pp. 8, 18. The intrusion into private affairs that occurs

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[2] Petitioner State of Washington raised an issue in its petition for review to this Court and its motion for reconsideration in the Court of Appeals that was not only new, but diametrically opposite from the arguments it made in the Court of Appeals briefing, and which is not before this Court. See PFR, at pp. 6-9, MFR, at pp. 23-25 (both arguing that the warrant affidavit could cure the inadequate warrant and authorize testing of the blood if it was physically attached to the warrant); see BOR (arguing that no probable cause, or search warrant, is needed to test blood); see Decision, at p. 13 n. 2 (noting that State had not argued cure theory). This claim of cure of the warrant's inadequacy depends on factual matters that the State was invited to, but did not attempt to establish, in the trial court, and the claim was therefore understandably no part of the Brief of Respondent. CP 7 (Defendant Martines' motion to suppress, at p. 5). Subsequently, the new legal argument was not properly placed before the Court of Appeals, having only been made in the State's motion to reconsider following the adverse decision in that Court. RAP 12.4(c).

when blood is tested for physiological data is a search.[3]

This must be correct, or the State would be entitled to test the arrestee Mr. Martines' blood -- not only for substances as to which there was no probable cause warrant authority anyway, such

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[3] Petitioner, addressing cases decided by the United States Supreme Court and cited by the Court of Appeals, attempts to cloak that question with confusion, where there is none. PFR, at pp. 14-15. The fact that the U.S. Supreme Court, when deeming forensic analysis of collected body fluids to be searches, employed the Fourth Amendment 'search' analysis within the larger *context* of special needs cases, is immaterial; the Fourth Amendment test is the same in either event. Thus in Ferguson, the Court held that the urine tests conducted by a state hospital were unquestionably searches under the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, ___ L.Ed.2d ___ (2001) (citing Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (the post-blood-taking "chemical analysis of a sample to obtain physiological data" is a further search beyond just the taking of the blood, under the reasonable expectation of privacy test)). Also not distinguished by the Petitioner is Robinson v. City of Seattle, 102 Wn. App. 795, 812-13, 817-18, 10 P.3d 452 (2000), which held that a pre-employment drug testing scheme implicated the Article 1, sec. 7 privacy protections of both personal autonomy and "confidentiality." The state blood cases cited by the Respondent from Utah, Minnesota, and Indiana – none of which, in further point, were analyzed under any state constitutional provision – conflict with Robinson, because, among other reasons, they rely on the reasoning that a person has no right to privacy in blood if the thing being held private therein is illegal drugs. Under Robinson, that tail does not wag the dog in the State of Washington. In State v. Price, 270 P.3d 527, 530 (Utah 2012), the court allowed testing of blood for drugs based on mere suspicion of alcohol use, because it was said to be like a dog sniffing the odor of illegal drugs that is emanating into the air from inside a car, as in Illinois v. Caballes, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 576 (2005). Testing Mr. Martines' blood for drugs did not, it is safe to say, involve simply sniffing the air rising from the test tube. Harrison v. Commissioner of Public Safety, 781 N.W.2d 918, 921 (Minn. App. 2010), involved a taking and testing of blood under an implied-consent statute in 2010, and the case did not address either Skinner, supra, or Ferguson, supra, much less Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), and suffers from the same salient critique by the Court of Appeals reasoning addressing United States v. Snyder, 852 F.2d 471, 474 (9th Cir. 1988) (see Decision, at pp. 9-10). And in Patterson v. State, 744 N.E.2d 945, 947 (Ind. App. 2001), the Court merely affirmed its own decision in Patterson v. State, 742 N.E.2d 4 (2000), which held that where Patterson's blood sample was lawfully taken by police pursuant to a search warrant, the State's subsequent use of Patterson's legally obtained DNA sample for comparison in a subsequent

as the drugs the State tested for when it had probable cause only for alcohol, but also for genetic inferiorities, for shameful disease, or indeed for its DNA -- to then compare to the CODIS database.[4] See State v. Gregory, 158 Wn.2d 759, 827, 147 P.3d 1201 (2006).

Now, the Petitioner contends that the Court of Appeals was incorrect in concluding that the testing of drawn blood is a matter of basic privacy, requiring any authority of law. But if a citizen's text messages – i.e., the typing of ephemera such as "what's up dog?" -- is part of one's private affairs and thus protected by the state constitution even when the message is freely cast out over the electronic airways, then the private physiological information hidden inside a person's own blood must surely be similarly protected against intrusion without authority of law. See State v. Hinton, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (wherein this Court looked to the "nature and extent of the information which may be obtained as

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unrelated case was a search, but it was reasonable under the facts of the case.

[4] The Petitioner suggests that the Court of Appeals overreacted by being concerned that the State's argument that drawn blood in law enforcement's possession may be tested for anything without a warrant would allow it to be tested for matters such as disease or genetic defect, and assures us that the State would never overreach in that manner by going beyond the magistrate's proper grant of authority. PFR, at pp. 7-8, 15-16. Considering that the State did exactly that in this very case – when it tested the blood for drugs, in the absence of either probable cause *or* any judicial grant of warrant authority -- this is a truly remarkable statement. See also Decision, at p. 7 (distinguishing State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007)).

a result of the government conduct" and whether the matter involves "intimate details about a person's activities and associations" in order to decide that text messages are part of our private affairs).

Police searches of our drawn blood for private physiological information must be authorized by (1) a grant of warrant authority, and (2) by a warrant that particularly circumscribes what is to be searched for.[5]

b. The principle that a search warrant should be read in a common sense manner does not cure the warrant's inadequacy in this case, because it entirely fails to grant particular authority to test the blood where it could have done so "because the circumstances of the case easily allowed."

Even the most laxly-enforced standard of particularity demands that the warrant specify the desired object of the search when it is easy and practicable to do so. Petitioner argues that search warrants should be read in a common sense, rather than "hypertechnical" manner. PFR, at p. 7 (citing State v. Perrone, 119

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[5] Throughout its Petition, the State contends that the Court of Appeals announced a new rule that blood testing is a search of a private affair and that searches require warrant authority. See, e.g., PFR, at pp. 10, 16-17. But the Court of Appeals made clear that the questions presented, and the answers, were unavoidable. Decision, at p. 7.

Wn.2d 538, 547, 834 P.2d 611 (1992)). But Perrone doesn't help the Petitioner.

First, just as much as it is appropriate to describe the warrant's deficiency as one of particularity (see AOB at pp. 6-10; Decision at pp. 11-12), the blood testing in this case violated the constitutional protections in the fundamental instance because it was a search conducted in the absence of any warrant authority whatsoever, as the Court of Appeals recognized. Decision, at p. 2 (noting that the warrant granted authority to draw blood, but "[t]he warrant did not say anything about testing of the blood sample.").

The Petitioner contends that a reasonable person reading the search warrant would sense that it envisioned not just a search by blood-drawing, but also blood testing. PFR, at pp. 6-7.

Yet Petitioner cites no case that stands for the proposition that a warrant granting authority to conduct one search, but plainly not granting authority to conduct a different intrusion, can be saved by reading it in a 'common sense' manner in order to ask what additional authority should have been obtained but was not – and then simply announcing that this latter authority therefore implicitly *was* granted. That is not a tenable argument, since as it upends the entire concept of requiring the applicant to seek, and obtain a

judicial grant of warrant authority in order to invade a reasonable expectation of privacy or intrude upon a private affair. See Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835 (1966) (search warrants must represent the deliberate determination of a grant of authority to conduct the particular search of the body in search of evidence of guilt). The Court of Appeals' decision made clear that the search warrant in the present case granted no authority to test the drawn blood whatever. Decision, at p. 12 ("As written, the warrant did not authorize testing at all.").

The search that was conducted in this case was utterly beyond what was authorized in the warrant's language, and the blood testing in this case was not conducted as a result of a reasonably 'mistaken' reading of the warrant language. See Leon, supra. Rather, this warrant was facially deficient. The problem with a search warrant that lacks particularity is that the warrant grants overly broad authority to search – authority that is so *expansive*, general and unspecific that it leaves it to the unfettered discretion of the police officer as the final authority to determine whether a particular search or object of the search is 'within' that general authority.

But here, also, if particularity is framed as the issue, the warrant fails a particularity analysis – and the rule of "common-sense" reading, contrary to the State's arguments, only **magnifies** that failure. The purposes of the search warrant particularity requirement primarily include "the prevention of general searches, and prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization." State v. Perrone, at 546-47 (citing 2 W. LaFave, Search and Seizure § 4.6(a), at 234–36 (2d ed. 1987), and Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927)). Perrone addressed the particularity requirement, which provides that search warrants must be issued

> upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. 4. There is no legal basis for the State's contention that it was "hypertechnical" of the Court of Appeals to decline to read the warrant as granting particular authority that may have been contemplated but was not granted by the magistrate. PFR, at pp. 6-7. This is not what the common-sense-reading directive of Perrone means, and it is not something that the particularity requirement tolerates. This Court in Perrone turned to

a decision of the same Court of Appeals to explain these principles:

> As the Court of Appeals has observed: The fourth amendment to the United States Constitution requires that a search warrant describe with particularity the place to be searched and the person or things to be seized. The requirements of particularity are met if the substance to be seized is described with "reasonable particularity" which, in turn, is to be evaluated in light of "the rules of practicality, necessity and common sense." State v. Withers, 8 Wn. App. 123, 126, 504 P.2d 1151 (1972). See United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). Accordingly, the degree of particularity required will depend on the nature of the materials sought and the circumstances of each case. State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975); State v. Salinas, 18 Wn. App. 455, 459, 569 P.2d 75 (1977).

Perrone, at 546-47 (citing State v. Olson, 32 Wn. App. 555, 557, 648 P.2d 476 (Division One, 1982)).

It is in this context that the actual rule of reading warrants (of which the State cites only a part) is correctly shown to be this: Pursuant to the Fourth Amendment, an officer must execute a search warrant strictly within the bounds set by the warrant, State v. Kelley, 52 Wn. App. 581, 585, 762 P.2d 20 (1988), and whether a search exceeds the scope of a warrant depends on a common sense reading of the warrant. State v. Anderson, 41 Wn. App. 85, 96, 702 P.2d 481 (1985), rev'd on other grounds, 107 Wn.2d 745, 733 P.2d 517 (1987). See State v. Cheatam, 112 Wn. App. 778,

783-84, 51 P.3d 138 (2002) (citing Kelley and Anderson). Similarly, federal cases have stated that "the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." (Emphasis added.) Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 n. 7, 91 S.Ct. 1999, 2004, n. 7, 29 L.Ed.2d 619 (1971); U.S. Const. amend. 4.

The rule that an officer must stay within the bounds of the warrant, in combination with Perrone, the federal cases, and the Court of Appeals' explanation in Olson hold equally true here. This Court in Perrone emphasized that the particularity requirement is based on the idea that police officers investigating a crime should be able to identify the thing to be seized with reasonable certainty and that those things therefore be delineated. Perrone, 119 Wn.2d at 546.

Thus the Perrone Court held: a description in a search warrant of what things are to be searched for meets the "particularity" requirement *if that description is as specific as the circumstances and the nature of the activity under investigation permits*. Perrone, 119 Wn.2d at 547. If the warrant reasonably could have been particular as to what specifically was authorized to be searched for, but was not, the item seized must be suppressed

because the warrant fails a particularity analysis.

For example, in State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003), this Court had occasion to decide whether a warrant authorizing installation of GPS devices on the vehicles of suspected drug dealers was defective under the particularity requirement, on ground that it failed to adequately specify the place to be searched and the item to be seized. The Court decided that the warrant survived a particularity challenge, because it was simply not *practically possible* for the warrant to be more specific about what routes of travel were sought to be collected, with any greater specificity than was employed. Jackson, 150 Wn.2d at 268. Therefore, the particularity rule was, and is:

> [A] description of the place to be searched and items to be seized is valid if it is as specific **as the nature of the activity under investigation permits.**

(Emphasis added.) Jackson, at 268 (citing State v. Perrone, 119 Wn.2d at 547). The prohibition against reading search warrants 'hypertechnically' means that warrants will not be invalidated on particularity grounds simply for failing to more precisely specify the particular things to be searched for, when, *given the circumstances and the crime at issue, such things could not practicably be*

described with any greater specificity than they were.

For further example, Professor LaFave states that "[s]ome leeway [in the particularity requirement] will be tolerated where it appears additional time could have resulted in a more particularized description" but there was an urgency to conduct the search quickly. 2 W. LaFave, Search and Seizure § 4.6(a), at 613 (4th ed. 2004). This factor does apply here and does not provide the laxity that the State seeks.

In the present case, the Petitioner's insistence that a "common-sense" reading of the warrant shows that the police were conducting a DUI investigation and thus were obviously desiring to seek (1) a grant of authority to draw blood, and (2) a grant of authority to test the blood drawn, only serves to show how abjectly the warrant fails the particularity requirements, because it could so easily have been specific as to testing of the blood. See Decision, at p. 12 ("Here the warrant obtained by the trooper could easily have been written to authorize testing of the blood for evidence of alcohol and drug intoxication, but it contained no such language."); Perrone, at 547.

Importantly, this Supreme Court has stated that warrants that involve a greater potential for intrusion into personal privacy

are properly given the highest scrutiny for particularity:

> We review a warrant describing physical objects with less scrutiny than we use for a warrant for documents because the former involves less potential for intrusion into personal privacy. [State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239, certiorari denied, 118 S.Ct. 1193 (1997)]; Andresen v. Maryland, 427 U.S. 463, 482 n. 11, 96 S.Ct. 2737, 2749 n. 11, 49 L.Ed.2d 627 (1976).

State v. Chambers, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997). If warrants that risk intrusion into areas protected by the First Amendment should be accorded greater scrutiny for particularity, then it seems also that warrants which risk discovery of the private medical, physiological data in a person's blood should receive at least similar protection against warrants that lack particularity.

(2). There was no *probable cause* for drug testing of the blood, an issue the Petitioner State of Washington has already conceded.

a. Under RAP 13.4(d), Mr. Martines seeks review on the issue of probable cause, raised below. Even if the search warrant could somehow be deemed to carry warrant authority that the magistrate did not grant, there was no probable cause for **drug** testing. This was argued both by trial counsel, and on appeal. CP 7-12; 115/12RP at 30-55; AOB, at pp. 1-2; 10-13; Reply, at pp. 1-2, 7-8. The State simply responded that on appeal that no probable

cause or warrant was required in the first place, and in fact conceded that the drug testing of Mr. Martines' blood was not supported by probable cause. BOR, at p. 10.

Therefore, if this Supreme Court were to decide to grant the State's Petition, it must necessarily take on the task of deciding the probable cause issue for the first time. RAP 13.4(d); see AOB, at pp. 10-13; see also Decision, at pp. 2-3; 13-14; RAP 2.5(a).

b. There was no probable cause for drug testing of Mr. Martines' blood. Here, Trooper Tardiff's search warrant affidavit fails to set forth facts indicating, much less establishing a probability of cause, that Mr. Martines was driving under the influence of drugs, and therefore it does not establish probable cause for a search for drugs in Mr. Martines' blood.

A warrant "may issue only upon a determination of probable cause." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); Wash. Const. art. 1, sec. 7; Coolidge v. New Hampshire, 403 U.S. 443, 454–455, 91 S.Ct. 2022, 2031–2032, 29 L.Ed.2d 564 (1971); U.S. Const. amend. 4. Probable cause exists where the application sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity, and crucially, that evidence of that criminal activity can be

found by the search. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004); see also State v. Chavez, 138 Wn. App. 29, 34, 156 P.3d 246 (2007).

An arresting officer who has special expertise or training in the form of being a DRE (Drug Recognition Expert) can certainly set forth facts that amount to probable cause suspicion of a person being under the influence of drugs. Chavez, 138 Wn. App. at 34.

> In narcotics cases, the court considers " 'the totality of the facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer.' " [State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996)] (quoting State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989)).

State v. Chavez, 138 Wn. App. at 34. In order to pass constitutional muster under this standard, an "application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." Thein, 138 Wn.2d at 140 (citing State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869 (1980)).

Under the DUI statute, whether probable cause for arrest exists depends on whether a trained and experienced officer has

knowledge of sufficient circumstances to create a reasonable belief that a suspect probably was driving under the influence of a drug, or alcohol, or both. Per RCW 46.61.502, driving under the influence is an "alternative means" crime -- being under the influence of drugs, and being under the influence of alcohol, or both, are not mere factual, definitional examples of the crime -- they are different, alternative offenses. State v. Shabel, 95 Wn. App. 469, 473, 976 P.2d 153 (1999); State v. Martin, 69 Wn. App. 686, 688-89, 849 P.2d 1289 (1993). Plainly, an officer who places not a single statement, fact, or suspicion regarding suspected intoxication with drugs at all into his affidavit – despite being a DRE officer capable of doing so -- has not set forth probable cause for the forensic testing of blood for the presence of any drug. In the warrant application, the affiant, Officer Tardiff, states that he is trained in "DUI detection." The affiant relates his investigation at the crash scene on SR 167, including his observations of "a strong odor of alcohol" on the defendant, Mr. Martines' physical appearance, and the defendant's conduct of tossing beer or beer bottles into the bushes. The report is completely and solely one of suspicion of alcohol intoxication.

Notably, although the affiant also indicates he was a Drug

Recognition Expert, he states no additional facts, nor indeed any basis of belief that Mr. Martines' was affected by a drug. There is no basis for concluding that drugs were involved where the expert in drugs does not even so state himself. See also State v. Baity, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000) (Drug Recognition Expert ("DRE") testimony may be admissible under ER 702 where it is helpful to the jury). Therefore, if the warrant in the present case could somehow be deemed a judicial grant of authority for blood testing, suppression is nevertheless required, because Trooper Tardiff set forth facts amounting to probable cause for the drawing of Mr. Martines' blood, and for the testing of that blood for alcohol -- and nothing further. The trial court erred in concluding that the existence of probable cause to test blood for alcohol per se establishes probable cause to test for the presence of drugs. See 11/5/12RP at 54-55. There were no facts in the search warrant affidavit supporting any suspicion of drug intoxication and, absent probable cause, the drug testing results were therefore improperly admitted at trial. U.S. Const. amend. 4; Const. art. 1, § 7.

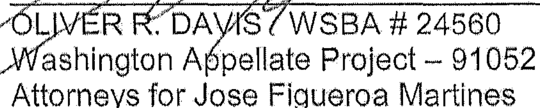
B. CONCLUSION.

The physiological data within drawn blood – whether DNA, markers of the ingestion of intoxicants, or evidence of genetic

inferiority or shameful disease – is sensitive physiological information that falls squarely within the privacy interests, and reasonable expectations of privacy, protected by the state and federal constitutions. Decision, at p. 11. It is unclear if the search warrant in this case, which the Court of Appeals noted could easily have been written to authorize blood testing, failed to do so simply because it was 'cut and pasted' in an inattentive manner, or for some other reason. But it did fail to do so, resulting in the present litigation and its mandated, inevitable outcome given Washington's requirement that searches be conducted only with authority of law. Following resolution of a number of existing cases which are likely to involve routine and proper re-testing of blood samples, future warrants will authorize these searches with carefully written documents presented to the magistrate.

This Court should deny the State's petition for review.

Respectfully submitted this 17 day of November, 2014.



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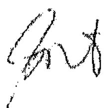
DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 90926-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent James Whisman, DPA
[paoappellateunitmail@kingcounty.gov]
King County Prosecutor's Office – Appellate Unit

☐ appellant

☐ Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 17, 2014

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Date: November 17, 2014

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To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Answe to State's Petition for Review

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